IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5066

IRVING JEROME DUNAWAY,

Petitioner,

—v.—

STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION, *AMICI CURIAE*

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INTEREST OF AMICI [1]

The American Civil Liberties Union is a nation-wide, non-partisan organization of over 200,000 members, dedicated solely to defending

[1] Letters of consent to the filing of this brief from the parties have been lodged with the Clerk of the Court.

the principles of freedom and democracy embodied in the Bill of Rights. The New York Civil Liberties Union is the New York state affiliate of the ACLU, having a membership of 20,000. It is similarly dedicated to defending our fundamental constitutional freedoms.

Central to those freedoms is the right to be free from unreasonable government searches and seizures protected by the Fourth Amendment of the United States Constitution. That Amendment erects a critical barrier between the government and the citizen, and it defines the standards which the government must follow whenever it seeks to invade "the right of the people to be secure in their persons."

The ACLU and NYCLU have repeatedly urged upon this Court a "strict construction" of that Amendment. New York has now substantially abridged the right to be free from unreasonable seizures by authorizing lengthy custodial detentions based on less than probable cause. It is the purpose of this brief to show that the practice authorized by New York is unconstitutional.

STATEMENT OF THE CASE

Four-and-a-half months after the murder and attempted robbery of a pizza parlor proprietor in Rochester, New York, detective Fantigrossi, of the Rochester police department, heard from a fellow officer that an informer had heard a rumor which named one of the people responsible. Fantigrossi interviewed the informer, whom he had not previously known. The informer told Fantigrossi that James Cole, at that time an inmate in the Monroe County Jail, had said that he and "Irving" - that is, petitioner Dunaway - committed the crime.

Fantigrossi then questioned Cole in the Monroe County Jail. Cole maintained his innocence. However, after two hours, he in turn said that Hubert Adams, a former inmate in the jail who was then incarcerated at Elmira Correctional Facility in New York, had told him two months earlier that his brother, "BaBa" Adams, and "Irving" had committed the crime.

Rather than questioning Hubert Adams, who was about 100 miles away in Elmira, rather than looking for "BaBa" Adams in Rochester, and rather than going to visit Dunaway himself in order to question him at his home, detective Fantigrossi sent detectives to Dunaway's home with explicit

instructions to pick him up and bring him to the police station for interrogation. Fantigrossi subsequently testified that he knew at the time he sent out the detectives that he did not have enough information to obtain a warrant. (A-24).

Detectives went to petitioner's house several times that day to no avail. At eight o'clock the next morning, detectives found petitioner's mother at home. Two of them entered without a warrant and searched the house for Dunaway. The third detective observed an unidentified woman leave by a side door and enter a house nearby. Two armed detectives, each over 6 feet 3 inches tall and weighing more than 200 pounds, went to the other house. Dunaway came to the door. He was 18 years old, had completed the tenth grade, stood 5 feet 7 inches tall, and weighed only 130 pounds. Although the detectives could not recall whether they touched him, Dunaway testified that they "grabbed" him and told him that they were taking him to the police station. (A-13). He repeatedly asked why, but the detectives did not answer him.

Respondent has stipulated that petitioner was in the custody of the detectives and that they would have physically restrained him if he had attempted to walk away.

At the police station, Dunaway was given Miranda warnings and questioned without delay. He immediately made inculpatory statements and drew sketches which were the basis of his convictions for felony murder (petitioner did not kill the victim) and attempted robbery.

At the suppression hearing before trial, the statements and sketches were ruled admissible. The conviction was affirmed without opinion by both the Appellate Division (A-33) and Court of Appeals (A-30). This Court granted certiorari, vacated, and remanded "for further consideration in light of Brown v. Illinois, 422 U.S. 590 (1975)." Dunaway v. New York, 422 U.S. 1053 (1975) (A-29).

In turn, the Court of Appeals remanded to the trial court because it found the record inadequate to determine whether petitioner was detained, whether there was probable cause for the detention, and "in the event there was a detention and probable cause is not found for such detention,... whether the making of the confession was rendered infirm by the illegal arrest. (See Brown v. Illinois, 422 U.S. 590, supra)." 38 N.Y.2d 812, 813-14 (1975) (Emphasis added), (A-26).

After the Court of Appeals had said that detaining Dunaway without probable cause would be an "illegal arrest," the

trial court, on remand, found that there was no probable cause for petitioner's detention, which it also viewed as an arrest. (A-24). Nevertheless, the Appellate Division, in a three-way split decision, reversed the trial court's suppression of the inculpatory statements and sketches. People v. Dunaway, 61 A.D.2d 299 (4th Dept. 1978). (A-5). Relying on a Court of Appeals case decided after the Court of Appeals remanded petitioner's case, People v. Morales, 42 N.Y.2d 129 (1977), on remand from this Court, 396 U.S. 102 (1969), the Appellate Division's majority reasoned that a "detention for interrogation based upon reasonable suspicion...where great public interest existed in solving a brutal crime which had remained unsolved for a period of almost five months," was a proper investigatory procedure. People v. Dunaway, 61 A.D.2d at 303. (emphasis added). The majority cited as an alternative ground for upholding Dunaway's conviction that:

> ...the statements and drawings made by defendant were of sufficient free will to purge the primary taint of any unlawful detention that may be said to have taken place....
> Id. at 304 (A-10).

The concurring Appellate Division justice agreed that Dunaway's detention

for interrogation was proper but stated that, if the detention had been improper, the inculpatory statements and sketches would indeed have been tainted. The dissent distinguished petitioner's situation from that in People v. Morales, 42 N.Y.2d 129 (1977), and found that petitioner's case was controlled by Brown v. Illinois, supra:

> [I]t may not be said that Dunaway was briefly detained under carefully controlled circumstances. Rather, he was illegally seized, detained or arrested and his rights should not turn upon the use or failure to use the word "arrest" where that, in fact, was his status.
> People v. Dunaway, 61 A.D.2d at 307 (Cardamone, J., dissenting).

The Court of Appeals affirmed without opinion (A-2), and this Court granted certiorari on November 28, 1978.

SUMMARY OF ARGUMENT

Detective Fantigrossi admitted that when he sent his burly detectives to Dunaway's home to pick him up for questioning he lacked the probable cause necessary for a warrant. He merely suspected Dunaway, as he had earlier - and erroneously - suspected Cole. Rather than drive south 100 miles to Elmira, or cast about Rochester for "BaBa" Adams, or go out himself and interview Dunaway at his house, Fantigrossi chose to have two large, armed detectives "grab" the slight, unarmed Dunaway without explanation and bring him to the police station. Dunaway had no choice but to go. He was young and unsophisticated, but he knew better than to resist arrest.

The rights of such uncharged individuals, in their own or their neighbors' homes, are precisely the rights that the Fourth Amendment was designed to protect. Warrants, when possible, and police determinations of probable cause, when they are not, are the innocent citizen's only protections against lengthy in-custody station-house detentions. But in New York no such controls presently exist. If the police in New York suspect someone of a "brutal and heinous" crime, they may simply "grab" him.

In developing this novel doctrine, the New York courts attempted to distinguish this Court's clear holding in Brown v. Illinois. I.A. However, the distinctions the New York courts drew were either irrelevant or erroneous, or both. I.A. The seizure of Dunaway was, in fact, an "arrest" for all relevant constitutional purposes, no matter what New York chooses to call it. Thus, it may not be effected on less than probable cause. I.A.

Moreover, examination of the three instances in which this Court has permitted the seizure of a person on less than probable cause confirms the fact that police station detentions may be effected only upon probable cause. I.B. Streetcorner stops, border inspections, and self-protective procedures followed after stops for minor traffic violations in no way resemble the extensive intrusions which New York has condoned. I.B. And the complex, multi-graded sliding scale analysis of Fourth Amendment issues adopted by New York, in addition to taking into account factors which are constitutionally irrelevant, also embroils the courts in a major new jurisprudential undertaking. I.C. Adopting the New York doctrine would require re-writing the body of Fourth Amendment law

in a way which would significantly impair the administration of justice as well as individual liberty. I.C.

Finally, the lower court's alternative holding, that the taint of Dunaway's illegal arrest had dissipated by the time he made his inculpatory statements and sketches, is clearly erroneous. II.

ARGUMENT

I. THE DETENTION OF PETITIONER WAS AN UNCONSTITUTIONAL SEIZURE BECAUSE IT WAS NOT BASED ON PROBABLE CAUSE.

The first question raised by the Court's remand of this case in light of Brown v. Illinois, 422 U.S. 590 (1975), is whether the custodial detention of petitioner for interrogation was legal. The question of "the legality of such custodial questioning on less then probable cause for a full-fledged arrest" was expressly reserved in Morales v. New York, 396 U.S. 102, 105-06 (1969). See also Terry v. Ohio, 392 U.S. 1, 19 n. 16 (1968); Davis v. Mississippi, 394 U.S. 721, 728 (1969).

This Court has made clear that

the legality of any forcible detention depends on the particular facts of each case, and not on the labels state courts apply to those facts. Here, armed policemen, concededly acting without probable cause, went to a private dwelling at eight o'clock in the morning, took a person into custody, and delivered him to the police station for extensive investigative questioning, which was preceded by full Miranda warnings. The detention of a person under these circumstances is an illegal seizure within the meaning of the Fourth Amendment regardless of the label New York gives it.

A. The Custodial Investigative Detention of Petitioner Is So Similar To That Effected Upon The Defendant In Brown v. Illinois That The Admitted Lack Of Probable Cause Renders It Unconstitutional.

In Brown v. Illinois, supra, the Court condemned detentions for custodial questioning effected without probable cause to arrest:

> "The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by

> the two detectives when they repeatedly acknowledged in their testimony that the purpose of their action was 'for investigation' or for 'questioning.' The arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up." 422 U.S. at 605. (record references and footnotes omitted).

As the Court noted in remanding petitioner's case, Brown is directly relevant here.

In both Brown and Dunaway, armed police entered the defendant's home without a warrant, shortly thereafter took him into custody, and then transported him to the police station in a police car. In both cases, the officers admitted that their suspects were not free to leave, and in both cases, the officers acted without probable cause. Both defendants were given Miranda warnings upon their arrival at the police station. Both were then questioned until they gave incriminating statements. From a constitutional viewpoint, the cases are indistinguishable.

Yet, despite these facts and this Court's explicit remand order, the New York courts have strained to distinguish

Brown rather than to follow it. The factors New York relies upon to distinguish Brown and to create a new exception to the Fourth Amendment's probable cause requirement are that: (1) "all investigative techniques, save interrogation, were exhausted;" (2) there was "reasonable suspicion;" (3) the crime was "brutal and heinous;" and (4) the seizure was "brief" and resulted in no formal "arrest" record. People v. Dunaway, 61 A.D.2d at 302-03 relying on People v. Morales, 42 N.Y. 2d 129, 136 (1977). None of these distinctions is valid.

First, neither Brown nor other cases in this Court have ever suggested that the safeguards of the Fourth Amendment can be dispensed with because of the unavailability of other investigative techniques. In fact, the Court has repeatedly indicated the opposite. Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971); Mincey v. Arizona, ___ U.S. ___, 57 L.Ed.2d 290, 300 (1978); Michigan v. Tyler, ___ U.S. ___, 56 L.Ed.2d 486 (1978). In any event, it is clear from the record in this case that a number of other "investigative techniques" short of forcible custodial

Q. Did you arrest Dunaway at that point, say you are under arrest?
A. No, sir, I did not.
Q. Did you have any conversation whatever with Dunaway?
A. Not at that point, no.
Q. Now, at that point—from that point on the three of you walked to the police car, is that correct?
A. Yes, sir.
Q. Was there any conversation while you were walking to the police car?
A. No, not that I can remember, not at that time.
Q. How far was the police car from 102 Walnut?
A. The police car was still parked approximately in front of the Broad Street address of Mr. Dunaway.
Q. And, well, that doesn't answer my question. How far was it?
A. Half a block.
Q. Well, 100 yards, 57 yards, half a block. There is some approximation?
A. Not very far. I wouldn't know in feet or inches.
Q. You will have to walk down three houses from 102 in the intersection, is that correct?
A. Yes, sir.
[52] Q. And then you would have to travel down Broad Street and up Broad Street?
A. We angled from the intersection and walked across.
Q. So, when was the first time you had a conversation, if any time, with Mr. Dunaway?
A. In the police car.
Q. Where were you in the police car, were you driving now?
A. No, sir, I was not.
Q. Where were you positioned in the police car?
A. I think I was seated in the front seat.
Q. Where was Dunaway?
A. He was in the back seat.
Q. Who else was with him?
A. Detective Mickelson.
Q. What was your conversation, if any, you had with Mr. Dunaway?

A. He said well, I think if I remember, he said why do we have to go downtown and talk. We said we would discuss that in full when we got downtown.
Q. Your testimony is he asked why he had to go downtown and talk?
A. Yes, sir.
Q. You said you would tell him?
[53] A. Yes, when we got downtown we would tell him.
Q. It was made clear to him and he had to downtown and that was where the conversation would be?
A. He was told, that was the answer that he was given for the question he asked.
Q. He asked why did he have to go downtown?
A. Why do we have to talk downtown and we told him that we would discuss it when we got downtown.
Q. Was there any discussion before that that he had to go downtown and talk?
A. No, sir.
Q. Out of the blue sky he said why do I have to go downtown?
A. Maybe he was thinking about it when we were walking to the car. I don't know if it was out of the blue sky or not.
Q. You don't remember anybody telling him he had to go downtown and talk?
A. No, sir.
Q. It was you who answered the question as to why or Mickelson?
A. I think it was a combination of the two of us telling him.
Q. Now, neither you or Mickelson or anyone else ever told him that he didn't have to come downtown, is that correct?
A. I never told him, no.
Q. Did you at any time, when he was put into the police car, [54] advise him that he was a suspect?
A. No, sir, I did not.
Q. Did you hear anybody advise him he was a suspect?
A. No, sir.

Q. Did anybody advise him of the so-called Miranda rights?
A. No, sir.
MR. SPIRES: You mean in the police car?
MR. CRIMI: In the police car or at the door at 102 Walnut Street. At any time up to the time he went to headquarters.
THE WITNESS: No.
Q. Is that police car the type of police car that has the wire partition between the front and back seat?
A. No, sir.
Q. What kind of a police car, marked or unmarked?
A. Unmarked.
Q. Was there any other conversation on the way to police headquarters?
A. No, sir.
Q. Approximately what time did you arrive at police headquarters?
A. Approximately 8:30 in the morning.
Q. What did you do with the gun when you arrived?
A. It was turned over to Detective Novensky.
[55] Q. Where?
A. In the Detective Bureau, the fourth floor of the Public Safety Building.
Q. Where did he go while he was there?
A. You mean where did Novensky take him?
Q. Yes.
A. I have no idea.
Q. What was the purpose for turning him over to Novensky?
A. They were going to continue the investigation.
Q. They were going to ask him questions?
A. I would assume so.
Q. You didn't know anything about that, did you? You were bringing him up there to be interrogated?
A. He was picked up, yes. I assumed they were going to talk to him. That is why they took him.
Q. You and Mickelson picked him up for the purpose of bringing him downtown to be interrogated, is that a fair statement?
A. To be talked to, yes, sir.

Q. To be talked to?
A. Yes, sir.
Q. Did you or anyone notify police headquarters that you had apprehended Dunaway and on your way down?
A. I don't think so.
[56] Q. So, that when you got to police headquarters Novensky wasn't waiting for you?
A. I don't think so, no. I think his tour was starting then. I can't be positive.
Q. How about Fantigrossi, was he there when you got there? Did you have any conversation with Fantigrossi and tell him you had picked up Dunaway?
A. No, sir, not that I remember that I had a conversation, no.
Q. There is absolutely nothing else that occurred at police headquarters that you had knowledge other than the fact you turned him over to Novensky, is that your testimony?
A. Yes, sir, that is as far as I went.
MR. CRIMI: I would like to have a moment, your Honor.
Q. Did you at any time put Dunaway under arrest?
A. No, sir.
MR. SPIRES: That has already been asked and answered. I object.
THE COURT: Overruled.
Q. Had I asked you that?
A. Yes, sir.
Q. Now, where was Ruvio at this time?
A. We left Ruvio at Broad Street and I didn't see him again until we got back to the car.
[57] Q. Was there a reason for leaving him?
A. At the time he was on the phone to Captain Cavoti.
Q. Somebody instructed him to call Cavoti?
A. We received a radio transmission he was to call Cavoti.
Q. Concerning what?
A. I don't know.
Q. Concerning this case?
A. All I know is he was instructed to call Captain Cavoti.

Q. When did that radio message come in?
A. Just as we arrived at Broad Street, the police station came in.
Q. Were you in contact with headquarters at all concerning the picking up of Dunaway to the time you were at Broad Street to 102 Walnut?
A. No, sir.
Q. Was anyone in your group?
A. I don't know.
Q. Did you have radios?
A. Yes.
Q. As far as you know no one communicated with anyone at headquarters? You apprehended Dunaway?
A. As far as I know, no.
MR. CRIMI: I don't have any further questions.

[58] REDIRECT-EXAMINATION BY MR. SPIRES:

Q. On that morning were you a member of a team with either Detective Ruvio or Mickelson in connection with the Dunaway investigation?
A. No, sir.
Q. Do you know if those two were a team by themselves?
A. Yes, sir.
Q. One with the other?
A. Yes.
Q. Each with the other?
A. Yes.
Q. Now, you testified that in the police car on the way downtown Dunaway inquired as to why he had to go downtown to talk?
A. Yes, sir.
Q. And do you remember the exact language, the exact words expressed?
A. No, sir, I don't.
Q. May he have said why do you want to talk to me downtown?
MR. CRIMI: I object to that.
THE COURT: Sustained.

MR. SPIRES: This question might refresh the man's recollection. I don't know the grounds of the [59] objection.
MR. CRIMI: The ground of the objection is you are suggesting by the inference of your advising something possibly could have been said this way or the other way.
MR. SPIRES: Might it not jog his recollection?
MR. CRIMI: That could jog anybody's recollection.
MR. SPIRES: This is a basis in the record. All right. You don't remember?
THE WITNESS: Pardon?
Q. You don't remember whether he might have said that?
A. No.
Q. Do you remember in the questions he asked you gentlemen on the way downtown, do you remember for sure whether or not he said anything which would indicate he had a compulsion to go downtown?
MR. CRIMI: I object.
THE COURT: Overruled.
THE WITNESS: The only thing was he did not object when we told him he would have to wait until he got downtown.
MR. SPIRES: That is not what I am asking.
MR. CRIMI: Let the answer stand.
[60] MR. SPIRES: May I repeat the question?
THE COURT: Yes.
Q. Whatever language Dunaway used in questioning why he had to go downtown to talk, as we said before, can you remember whether or not he used any words which indicated a compulsion that he had to go downtown?
MR. CRIMI: I object to the form.
THE COURT: Overruled.
THE WITNESS: No, sir.
MR. CRIMI: Indicating compulsion is a valid question on direct and this is redirect. I accept.
Q. Do you remember whether or not he said why do I have to go downtown to talk?
MR. CRIMI: I object, the inflection of the voice "do I have to go downtown".

Q. The question asked originally was answered in a conclusory fashion, not a quotation form.

MR. CRIMI: It is your witness, I don't draw the conclusions from him. Exception.

MR. SPIRES: I am sorry, it was your witness when this question was asked.

Q. Do you remember whether he used that language, why do I have to go downtown to talk?

[61] A. I think he said why do we have to go downtown to talk.

Q. You think he did use that language?

A. Yes.

Q. That question was answered in what fashion, how was it answered?

A. When we get downtown, we will explain to you in full.

Q. On the way, I believe it was at the Walnut Street house where you and Detective Mickelson encountered Dunaway, is that correct?

A. Yes, sir.

Q. On the way from—well, at Walnut Street address when you first observed the front door, the front door was open, is that correct?

MR. CRIMI: I object to that. That is—

MR. SPIRES: That is leading.

THE COURT: That is leading. Sustained.

Q. When you saw Mr. Dunaway for the first time, was the front door of Walnut Street opened?

A. Yes, sir.

Q. From that point when you first saw him to the time you walked with him and Mickelson out to the sidewalk, did you see any other person with Mr. Dunaway?

A. No, sir.

[62] Q. Did you see any other person in the doorway at Walnut Street?

A. No, sir.

Q. Did you see any other person follow you people out to the sidewalk?

A. No, sir.

Q. Did you see any other persons follow you to the Broad Street address?

A. Not that I noticed, no, sir.

Q. Now, did you observe yesterday afternoon in the corridor right outside of this courtroom—

MR. CRIMI: How is this redirect? I would like to know, your Honor, once and for all and let's run these trials correctly. How is this redirect? Where did I say anything about other people present and following him on cross-examination?

MR. SPIRES: Never mind the following—the specific question was asked about this witness about any other people.

MR. CRIMI: The only thing he observed was Mickelson taking Dunaway.

THE COURT: Overruled.

MR. CRIMI: Exception.

[63] THE COURT: As far as the people at Walnut Street address, but sustained as to the people in the hallway.

MR. SPIRES: All right. I have no further questions.

RECROSS-EXAMINATION BY MR. CRIMI:

Q. Are you telling us now you observed that the door was open?

A. When I first saw Dunaway he was coming through an open door, yes, sir.

Q. Prior to that your only observation, as I understand, was that you, if it is to be called an observation, that you heard Mickelson say Dunaway or possibly heard him say Axlerod, Dunaway, is that correct? The only observation you made?

A. Yes, sir.

MR. CRIMI: That is all.

REDIRECT-EXAMINATION BY MR. SPIRES:

Q. Try and repeat for us the way you heard Detective Mickelson say those words, what you heard?

A. Axlerod and Dunaway.

MR. CRIMI: Well, did you hear those words Axlerod, Dunaway because you could only pick up part of the conversation or those were just the only words he said?
[64] THE WITNESS: Those were the words he said, Axlerod, Dunaway.
MR. CRIMI: One after the other?
THE WITNESS: Yes.
MR. SPIRES: Did you hear those words in a declarative or interrogatory manner?
MR. CRIMI: I object.
THE COURT: Overruled.
THE WITNESS: Like he was talking to Axlerod, Dunaway.
MR. SPIRES: Like he was saying the names rather than asking?
THE WITNESS: Yes, sir.
MR. SPIRES: Thank you.
MR. CRIMI: That is all.

(Whereupon the witness was excused.)

ROBERT C. MICKELSON, called herein as a witness, first being duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. SPIRES:

Q. You are a detective in the Rochester Police Department?
A. Yes, sir, I am.
Q. Do you recall testifying before the Monroe County Court, Judge Ogden presiding in 1971 to '72, in a pretrial hearing in this matter?
[65] A. Yes, sir, I do.
Q. Were you furnished with a copy of your prior testimony?
A. Yes, sir.
Q. Have you reviewed it?
A. Yes, sir, I have.
Q. If you were asked all of those same questions again, would you answer any of them differently?
A. No, sir, not intentionally, no, sir.

Q. Going back to the morning of August 11, 1971, tell us, please, the exact circumstances under which you encountered, actually met Dunaway?
A. There was a house and it was on a street off of Broad Street. I testified at that time, I can't recall the name of the street. I went up to the house, a green house, and went up to the house and knocked on the door. Dunaway came to the door and I said Mr. Dunaway, and he said yes. I said we would like to talk to you downtown, would you like to talk to us? He said yes. He came out of the house, walked between myself and another detective and got in the police car. We drove him downtown. At that time he was taken by two other detectives and I was sent home.
Q. This house on this other street, might that have been Walnut [66] Street?
A. Yes, sir.
Q. Was it Walnut?
A. Yes, sir.
Q. You don't remember the name?
A. No, sir.
Q. Did this house on Walnut have a porch in the front?
A. I can't recall if it had a porch, sir.
Q. Did it have steps?
A. Yes, sir.
Q. Had you knocked on the door?
A. I knocked on the door.
Q. The front door?
A. Yes, sir.
Q. Was it Dunaway who opened the door?
A. Yes, sir, it was.
Q. At that time were you standing on the top step outside the door?
A. I was standing just outside the door. I can't recall if Iwas on the step. I was outside the door.
Q. When Dunaway opened the door, was he holding that door open while you were conversing with him?
A. I can't recall.

[67] Would you remember if he closed the door behind him and stepped out to talk to you?

A. He stepped out. I can't recall if he closed the door.

Q. From the time you first saluted him, spoke to him, to the time you placed him in the police car, did you touch him in any way?

A. No, sir, I didn't.

Q. Touch any part of his clothes?

A. No, sir.

Q. Was the other detective with you Luciano?

A. Yes, sir.

Q. Did Luciano touch him, do you recall?

A. I can't recall, sir. I don't know.

Q. Can you recall, to the best of your ability, the exact words you used in talking to Dunaway at the doorway?

A. To my recollection he came to the doorway. I said either Mr. Dunaway, Axlerod, and he said yes. I said please, would you like to come downtown and talk to us?

Q. Would you like to come down and talk to us?

A. Something like that.

Q. Do you recall everything he said in response?

A. All he said was yes and walked out of the door and came with us.

[68] Q. He agreed to go downtown with you?

A. Yes.

MR. CRIMI: I object to agreed.

THE COURT: Sustained.

Q. If Mr. Dunaway had not said yes, and accompanied you, but instead had refused, if he had refused to accompany you, would you have forced him to accompany you?

A. At that time I would have placed him under arrest, yes, sir.

Q. Did you place him under arrest?

A. No, sir, I didn't.

Q. Did you take him into custody?

A. I asked him to go downtown and he agreed. I took him down.

Q. Did you believe you were taking him into custody?

A. I knew I was taking him downtown.

CROSS-EXAMINATION BY MR. CRIMI:

Q. I understand you had an opportunity to review your testimony that you gave at a previous suppression hearing and the trial, is that correct?

A. Yes, sir.

Q. You did review it, is that correct?

A. Yes, sir, I did.

Q. Now, Detective Mickelson, you had been at the Broad Street address prior to 8:00 o'clock that day?

[69] A. Yes, sir, I was.

Q. As a matter of fact, how many times had you been there before?

A. I can't recall. It was several times.

Q. Starting about what time?

A. It was at night. I can't recall. It was late at night, that night. It wasn't after midnight, it was late.

Q. It was not after midnight?

A. No, sir, it was late at night.

Q. You say you were there several times, would that be two or three times?

A. Yes, sir.

Q. And your purpose on each of those times was to pick up Dunaway?

A. Yes, sir.

Q. You were prepared to arrest him, is that correct?

A. Yes, sir.

Q. You, prior to going down the first time you went down to Broad Street, I understand that you had a conversation with Fantigrossi?

A. Yes, sir.

Q. What time was that?

A. I can't recall.

[70] Q. Had Mr. Spires asked you to refresh your recollection by looking through the record of this case?

A. Yes, sir, but I can't recall any questions of that nature.

Q. Well, didn't you make a police report on this case?

A. Yes, sir, I certainly did.

Q. Have you seen that?

A. No, sir.

Q. You haven't.
A. No, sir.
Q. After this investigation was over, whatever you testified to at the previous hearing and at that time this hearing is a matter in that police report, is that correct?
A. Yes.
Q. In view of the fact we are going to continue this, I would like that to be produced, your Honor, and Mickelson called back.
THE COURT: That will be produced for you and if you want to, you can recall Detective Michelson. That right is reserved for you.
Q. As I understand it from Lieutenant Fantigrossi's testimony, that he definitely told you to find Dunaway and bring him in?
A. Yes, sir.
Q. So, at that point you knew that you were going out to seize [71] Dunaway, is that correct?
A. Yes, sir.
Q. You did not apply for an arrest warrant, did you?
A. No, sir, I didn't.
Q. You went to Dunaway's home several times following that conversation?
A. Yes, sir.
Q. Who did you go with?
A. Detective Ruvio.
Q. Anybody else?
A. No, sir.
Q. Detective Fantigrossi stayed there. There was another team involved?
A. Yes.
Q. What was that team doing?
A. I don't know.
Q. Do you recall testifying that you spent prior to going to Walnut Street at 8:00 o'clock in the morning, that you had spent time searching the west side of Rochester for Dunaway?
A. Yes, sir.
Q. And you did that?
A. Yes, sir, we did.

Q. How long a period of time did you do that?
[72] A. It was all night.
Q. While you were searching was anyone applying for any kind of an arrest warrant?
A. Not that I know of.
Q. Did you ever have any arrest warrant?
A. No.
Q. Did you have a search warrant?
A. No, sir.
Q. Can you tell us what you did the first time that you went to the Broad Street address?
A. Yes, sir.
Q. What did you do?
A. Walked up to the door and knocked on the door and a woman came to the door. I asked if this was the home of Mr. Dunaway and yes, it was. It was her son and is he home and said no. I can't recall now whether she allowed us in—yes, we went inside.
Q. This is the first time?
A. Yes, sir, we went inside and we talked with Mr. Dunaway's mother. She said he was not home and we left.
Q. Did you tell her what you were looking for?
A. I said it was an investigation and we would like to talk to him.
[73] Q. Then you went there a second time?
A. Yes, sir.
Q. About when was that?
A. Sir, I really can't recall the time.
Q. You went there a third time?
A. Yes, sir.
Q. What time was that?
A. Sir, I really can't recall the time. It was late, it was through the night that we were looking.
Q. I am trying to fix how many times had you been there before this 8:00 o'clock knock on the door?
A. I can't recall whether it was two or three times. It was two or three or possibly four times that we were there.

Q. Now, at any time when you were there, on any of the times that you were there on Broad Street, did you look through the rooms of the house?

A. Yes, sir.

Q. And Detective Ruvio looked through the rooms of the house?

A. Yes, sir.

Q. You were searching for Dunaway?

A. Yes, sir.

Q. You had no search warrant?

A. No, sir.

[74] Q. Nor did you have an arrest warrant?

A. No, sir.

Q. Were you in communication with anyone at police headquarters through the search that night as to what you were doing and what success you were having?

A. Not that I recall.

Q. You can't recall?

A. Yes.

Q. You have a police radio?

A. Yes.

Q. All these times you were searching the west side of Rochester and the two or three times you had been to Broad Street, you never communicated whether you were having success or failure?

A. No, sir—well, Detective Ruvio at the time we went there in the morning, Detective Luciano, Detective Ruvio called Captain Fantigrossi by phone from Dunaway's.

Q. That is before you found Dunaway?

A. Yes.

Q. Did he tell you the message from Fantigrossi?

A. No, sir, I didn't talk to the Captain.

Q. Did you talk to Ruvio?

A. Yes, sir.

[75] Q. What did Ruvio say, the Captain say?

A. I didn't converse about the conversation on the phone. I was talking with Dunaway's mother.

Q. Where was the call made from?

A. Dunaway's home.

Q. So, you are saying Ruvio called from Dunaway's home and called Fantigrossi?

A. Not Fantigrossi, Captain Cavoti.

Q. At 8:00 o'clock in the morning you went to the address on Broad Street. Does 835 register as a possible number of that address on Broad Street?

A. Possibly.

Q. And Broad Street runs which direction in Rochester?

A. Broad Street runs north and south.

Q. And Walnut, therefore, would run east and west, is that correct?

A. Yes.

Q. Walnut intersects Broad?

A. With Broad Street, yes.

Q. How far was that house on Broad Street from 102 Walnut?

A. Maybe two blocks.

Q. After you—strike that out. I believe you testified after you had been at Walnut and looked through the house [76] and did not find Dunaway there, that you went outside and you saw Detective Luciano?

A. Yes, sir, it was the Broad Street house.

Q. I am sorry, did I say Walnut? The Broad Street house.

A. Yes, sir.

Q. Where was Luciano at the Broad Street address?

A. Staying out in the front over by the car. The car was parked on the curb across the street from the house. It would be the east curb.

Q. So, he was—was he standing by the car?

A. In that vicinity.

Q. Was he on the driveway on Broad Street?

A. Not that I recall, sir.

Q. When you came out of Broad Street address, did you go across the street to talk to him at the car?

A. I can't recall, sir, where he was standing at the time I talked to him in the street.

Q. He was in the street?

A. Yes, sir.

Q. Well, of course, by street do you mean—
A. He was in the vicinity of Broad Street, across from the Broad Street address. I can't recall.
Q. Had you asked him to stay in the driveway at Broad Street [77] address?
A. I can't recall. No, sir, I could have.
Q. Did you have any plan at all in three police officers approaching Broad Street as to how you would handle the situation?
A. Well, yes, sir. One policeman would stay out in front and watch the door in case if we knocked somebody came out, yes, sir.
Q. Your intention was to arrest him or seize him or restrict his freedom of moving once you saw him?
A. Our intention was to take him downtown and talk to us.
Q. Whether or not he wanted to come voluntarily, is that correct?
A. Yes, sir.
Q. There is no question about that?
A. No.
Q. Now, you knocked on the door at 102 Walnut?
A. Yes, sir.
Q. At that time did you have a photograph of Dunaway?
A. I can't recall.
Q. You can't recall if you ever had a photograph?
A. I can't recall if I had a photograph.
Q. If you testified at the other trial that you had a photograph, [78] would that be true?
A. Yes, sir, it probably would.
Q. At any rate, when you went to the door, you don't recall whether you had a photograph at all?
A. I don't recall.
Q. You knocked on the door, did you?
A. Yes, sir, I did.
Q. Where was Luciano when you knocked on the door?
A. Standing in the driveway.

Q. Did you tell him to position himself there?
A. I didn't say anything there. He just said I will wait in the driveway.
Q. Did you ever have any conversation with Luciano from the time you left Broad Street to the time you got to Walnut Street?
A. Yes, sir, I did.
Q. What did you say to him?
A. Luciano said to me first, did you see the little girl run out the back door, and I said no, I didn't. He said she ran into that gray house there. I said let's check it out. He might be in there and that is why we walked there. That is in sum and substance our conversation.
Q. You didn't tell Luciano you stay outside?
[79] A. I can't recall.
Q. You didn't go up there haphazardly, you went up there with a plan?
A. Yes, sir.
Q. And your plan was to take him into custody, is that correct?
A. Yes, sir.
Q. After you knocked on the door, Dunaway came to the door, as I understand it?
A. Yes, sir, he did.
Q. Now, this was, do you recall the house at all, have any recollection of this house?
A. It was a gray house.
Q. It was a small cottage-type house?
A. I can't recall that, either. I have not seen that house since.
Q. You have not seen the house since?
A. No, sir.
Q. There are three steps at the house?
A. I can't recall how many steps there were. There was a step up to the door.
Q. You were at the top step. Where you went you knocked on the door?
A. I can't recall that, either.
[80] Q. You mean you could have been?
A. I could have been standing on the sidewalk.

Q. And reached up to knock on the house?
A. Yes, sir.
Q. Is the step that narrow and small you could reach?
A. I can't recall whether I was standing on the step or sidewalk. I knocked on the door.
Q. Mr. Dunaway came out?
A. Yes, sir, he did.
Q. What did you say to him?
A. I said to Dunaway, to the best of my recollection, I said, Dunaway, and he said yes. I said we would like to talk to you downtown.
Q. Did you identify yourself?
A. I believe I did, yes, sir.
Q. You are not sure?
A. I am not sure.
Q. Did you show him—how were you dressed?
A. Just like this, a suit, a sport coat and slacks, tie and shirt.
Q. Did he know you were a police officer?
A. Well, he must have. He came downtown with us.
Q. You are not saying—you are not really sure that you told [81] him you were a police officer?
A. I don't know whether I told him or not. I really can't recall.
Q. Did you tell him why you wanted to talk to him downtown?
A. No.
Q. That is the only conversation you had with him?
A. Yes, sir.
Q. Now, you say you don't recall whether Detective Luciano had a hold of Dunaway's arm or had a hold of him?
A. No, sir, I don't recall.
Q. But you at no time from the time you left the 102 Walnut Street, you walked two blocks to the police car and you at no time had any hand at all, either on the person or the clothing of Dunaway, is that correct?
A. No, sir, I didn't.
Q. You did not have?
A. No, sir.

Q. How about Luciano?
A. I can't recall.
Q. Is there any way I could refresh your recollection as to whether he did or not?
A. I can't recall. I don't know.
Q. You don't know?
[82] A. Luciano was on the one side and I was on the other side. Dunaway was in the middle. I wasn't even facing Dunaway or Detective Luciano.
Q. Are you saying that you were not in a position to observe whether or not he had a hand on him, is that what you are saying?
A. I didn't observe Luciano touch him. I was in a position where I could have, but I didn't.
Q. You never saw Luciano have a hand on him?
A. No, sir.
Q. On his pants or on his belt?
A. No, sir.
Q. Or on his arm?
A. No, sir.
Q. The three of you walked down from 102 Walnut to where your car was, as you say, approximately two blocks away with no handcuffs and no hold of any kind?
A. No.
Q. I take it that he could have run away?
A. Yes, sir.
Q. This is the man you had been searching for for several hours?
A. Yes, sir.
Q. This is the man that you had instructions to definitely [83] pick him up and bring him downtown?
A. Yes, sir.
Q. For what purpose?
A. To talk to him.
Q. To talk to him and you said to Mr. Spires that you would have arrested him, is that correct?
A. Yes, sir.
Q. Then you would have talked to him after you would have arrested him?
A. Yes, sir, if it became necessary to arrest him, yes, sir.

Q. There is no question he was a target?
A. No question about it.
Q. Did you at any time at 102 Walnut or Broad or in the police car at any time that you went to police headquarters, advise him of what you wanted to talk to him about?
A. No, sir.
Q. Did you at any time ever advise him of his right to an attorney or the Miranda rights?
A. No, sir.
Q. When he was in the police car, who was in the back with him, if anybody?
A. I don't recall.
Q. Somebody in the back?
[84] A. Somebody was in the back.
Q. At that point did you have him in custody?
A. Yes, sir.
Q. At that point did you advise him of any rights?
A. No, sir.
Q. Didn't even tell him what that was about?
A. No, sir.
Q. Is it true he asked you and Mr. Luciano why he had to go downtown to be questioned?
A. Yes, sir.
MR. SPIRES: I object to the form of the question.
THE COURT: Overruled.
Q. Did you answer why he had to go downtown?
A. Yes, sir.
Q What did you tell him?
A. I said we wanted to talk to you about something and we will discuss it when we get downtown.
Q. Did you make it clear to him you didn't want to discuss the matter at his home?
A. Yes, sir, at his home, no.
Q. Or at 102 Walnut?
A. No, sir.
Q. You didn't?
[85] A. No, sir.

Q. Did you give him that option? You definitely wanted him to know that you were going to talk to him downtown and nowhere else?
A. I can't recall. I don't believe we had any conversation from 102 Walnut to the police car.
Q. Well, in the police car?
A. In the police car he asked why do you want to see me. I said we will talk about it when we get downtown.
Q. Now, when you got to the police car, that is the police car in front of Broad Street? Where was Ruvio?
A. I can't recall.
Q. You can't recall?
A. No.
Q. At that time did you make any kind of a communication downtown?
A. I can't recall that, either.
Q. Did you ever communicate before you brought him to police headquarters? You had him in custody?
A. I can't recall, possibly.
Q. Now, when you were at the door of 102 Walnut Street, did you or did you not say anything to Luciano that he was in the driveway?
[86] A. I motioned him over and Dunaway was coming out the door, like that.
Q. You didn't say anything?
A. No, sir, I can't recall saying anything.
Q. You can't recall?
A. No, sir.
Q. You didn't say anything, well, I got him and then call?
A. If I testified to that.
Q. I am not saying you testified to it.
A. I can't recall.
Q. Was it possible you said to Luciano I have got him and waved him on to you?
A. Yes, sir, it is possible.
Q. At that point you had not put any hand on Dunaway at all?
A. No, sir.

Q. Was Dunaway trying to run away?
A. No, sir, he wasn't.
Q. What did you call Luciano over for?
A. Procedure.
Q. Procedure?
A. Yes.
Q. How far was Luciano from you?
A. He was in the driveway.
[87] Q. How far was the driveway from the steps?
A. I don't know, ten feet.
Q. Luciano was ten feet away and you called him over to the steps, is that correct?
A. Yes.
Q. Did you do that because you wanted him to assist you?
A. Yes, procedure.
Q. What do you mean by procedure?
A. Well, he would have attempted—if he would have attempted to break away, there would have been two of us there.
Q. He is only ten feet away, is he not?
A. Yes.
Q. You were both armed, were you not?
A. Yes, sir, we were.
Q. And Luciano came over?
A. Yes, sir.
Q. He did nothing?
A. No.
Q. Place no hand—
A. I can't recall.
Q. Luciano can't recall whether you placed a hand on him and you can't recall whether you placed a hand on him?
A. I am sorry, sir, I can't recall. I know I didn't place a [88] hand on him myself. I know I didn't. He came down out of the doorway and walked with us.
Q. But, as far as Luciano is concerned, you have no recollection?
A. No, I don't.
Q. Did you see that little girl again at any time that day at that point?
A. I can't recall seeing her, no.

Q. You can't recall?
A. No, in fact I never saw her. Luciano told me about her. I can't recall seeing her.
Q. Now, this doorway, did you see anyone else at the doorway or was it possible for you to see anyone else at the doorway?
A. Yes, sir. It was—I can't recall. There were other people inside the house. I can't recall.
Q. What time was it that you walked with Mr. Dunaway and the others to the car?
A. It was approximately 8:30.
Q. Were there any other people around that neighborhood?
A. I didn't see anybody.
Q. You didn't see anybody?
A. No, sir.
[89] Q. You didn't see Ruvio?
A. Ruvio was by the car.
Q. Now, when you got to police headquarters, what did you do with Dunaway, if anything?
A. We got to police headquarters, Detective Novensky took over and we were told by Captain Cavoti to go home.
Q. Did they know you were going to arrive?
A. Yes, sir.
Q. How did you communicate your expected time of arrival?
A. We must have called on the air. I can't recall. I will have to listen to the tapes.
Q. Do you have any recollection of what you said?
A. No, sir, I don't.
Q. You must have said you caught him or captured him or seized him or something like that?
A. Possibly.
Q. But, at any rate, Novensky was waiting for you?
A. With other detectives.
Q. Did you then have anything else to do with Dunaway after you turned him over to the police?
A. No, sir, I didn't.

Q. Up to the point that it was turned over to Detective Novensky, did you or anybody in your presence advise him [90] of any rights?

A. No, sir.

Q. Had you placed him under arrest formally?

A. No, sir.

Q. Now, this was August 11, 1971, is that correct, when you picked up Dunaway?

A. Yes.

Q. That was approximately how many months after the incident?

A. I can't recall the incident. It was in the spring time. I believe it might have been about in March 26th, yes.

Q. This was some distance from the scene of that incident, is that correct?

A. Yes, sir.

Q. A mile and a half or two miles away, something like that?

A. Yes, sir.

MR. CRIMI: May I have a moment?

THE COURT: Yes, Mr. Crimi.

MR. CRIMI: I guess that is all.

MR. SPIRES: May counsel approach the bench?

THE COURT: Certainly.

(Whereupon there was an off the record discussion.)

REDIRECT-EXAINATION

BY MR. SPIRES:

Q. Did I hear your testimony when Dunaway was in the police [91] car that you considered him to be custody?

A. He was in the police car. I asked him to be in custody.

Q. In your mind as a police officer, is there any difference between somebody being in custody and somebody being under arrest?

A. Yes, sir.

Q. Can you explain the difference as far as you understand it?

A. If a person is placed under arrest, the procedure, as I follow, you handcuff him in the car. A person in custody going in for an interview, is not handcuffed and placed under arrest. He comes voluntarily.

Q. When you arrest somebody you handcuff them, that is your procedure?

A. Yes.

Q. What is the purpose for handcuffing a person?

A. So he dosen't attempt to get away.

Q. Hadn't you already testified that you would have followed those same procedures to prevent Dunaway from getting away?

A. Yes, sir.

Q. So, as a practical matter, is it fair to say that Dunaway was really under arrest but hadn't been handcuffed?

A. No, he was in custody for an interview, an interrogation.

Q. Do you mean he had not been arrested and charged with a [92] crime, is that what you mean?

A. That is what I mean.

MR. SPIRES: No further questions.

RECROSS-EXAMINATION

BY MR. CRIMI:

Q. Are you saying he was not free to go at any point, is that correct?

A. That is what I am saying.

Q. But in your mind he was not under arrest?

A. I didn't formally place him, no.

Q. Formally?

A. No.

Q. But as a practical matter, from the time you walked him from 102 Walnut Street to the police car, he was in your custody and Luciano's?

A. Yes, sir, he was in our custody, yes, sir.

Q. He was in your physical custody, you were both there?
A. We were both there.
Q. Had he tried to run you would have taken appropriate measures?
A. Yes, sir.
Q. What would those measures have been?
A. Apprehended him.
Q. To apprehend him?
[93] A. Yes, sir.
Q. There is no question in your mind his freedom of movement was definitely restricted from that point on?
A. Yes, sir.
Q. But you didn't consider him to be under arrest because you didn't formally say to him you are under arrest?
A. Right, sir.
Q. Informally you knew he was under arrest?
A. Informally, yes.
Q. In other words, the difference between formal and informal are the magic words that I am applying to you under arrest?
A. Yes.
Q. That is the only difference we are talking about?
A. Yes, sir.
Q. Plus the handcuffs?
A. Yes.
Q. Plus the handcuffs?
A. Yes.
Q. But handcuffs or not, handcuffs, had he tried to get away, you would have either taken whatever measures you thought necessary to capture him?
A. I had orders to bring him in, yes, sir.
Q. Pardon?
[94] A. I had orders to bring him in, yes, sir.
Q. Those orders were definite?
A. Yes, sir.
MR. CRIMI: I don't have any further questions.
MR. SPIRES: If he had attempted to run away, would you have handcuffed him then?
THE WITNESS: Probably, yes.

MR. SPIRES: According to your previous definition of an arrest, he would have been arrested?
THE WITNESS: If he would have tried to get away, yes, sir.
MR. SPIRES: Even though he would not have been charged with any form of crime, you would consider him under arrest?
THE WITNESS: Yes, sir.
MR. SPIRES: Nothing further.
THE COURT: If you wanted to place Dunaway under arrest, what procedure would you follow from the time he came out of the door?
THE WITNESS: I would have said Dunaway, if he identified himself as Dunaway. I would have said we would like to talk to you downtown.
THE COURT: This is if you were going to formally arrest the Defendant?
[95] THE WITNESS: Yes, sir, if he refused to come downtown, then I would take other action.
THE COURT: Would you have told him he was under arrest or intended to arrest him?
THE WITNESS: Sometime if I have a warrant in my pocket, I would.
THE COURT: So, your procedure varies when you make an arrest?
THE WITNESS: Personally, yes. My procedure does.

RECROSS-EXAMINATION BY MR. CRIMI:

Q. Were you told by Lieutenant Fantigrossi to go out and arrest him?
A. I was told by Fantigrossi to go out and pick him up.
Q. He definitely told you to pick him up?
A. Yes, sir.
Q. There is no question you had to bring him back?
A. No question.
Q. Whether he came voluntarily or not, you wanted him back there?
A. Yes, sir.

Q. That is how you understood Fantigrossi's order?
A. Yes, sir.

REDIRECT-EXAMINATION BY MR. SPIRES:

[96] Q. May I assume correctly, Detective, that there is some time when you are directed by your superiors to go out and bring somebody in when there is an arrest warrant for such a person?
A. Yes, sir.
Q. And in all such cases, are you given either the arrest warrant or a copy of the arrest warrant?
A. Yes.
Q. Each case?
A. I am not given a copy of it, I know one is on file or I take a copy with me.
Q. Sometimes knowing one is on file, you go out not having a piece of paper?
A. Yes, sir.
Q. On those occasions, what are your instructions?
A. Pick him up and bring him in.
Q. The instructions are not to arrest him?
A. Pick him up and bring him in.
MR. SPIRES: Thank you.

RECROSS-EXAMINATION BY MR. CRIMI:

Q. In other words, if there is an arrest warrant on file your instructions are to pick him up and bring him in, the same instructions you got from Fantigrossi in this [97] case?
A. Yes.
Q. Was there an arrest warrant filed here?
A. No, sir.
MR. CRIMI: Thank you.
THE WITNESS: May I explain something?
THE COURT: That is up to the attorneys.
THE WITNESS: May I explain something? It is my procedure, I don't go into a place to arrest somebody. If I got an investigation going and I walk into a barroom or wherever I locate that person, I am not in the habit

of saying you are under arrest, you are coming downtown with me. I usually say, sir, I would like to talk to you outside, like that.
MR. CRIMI: Even though there is an arrest warrant for him?
THE WITNESS: Even though there is an arrest warrant, I rather do it that way rather than start a commotion someplace where I can't handle it.
MR. CRIMI: In that case you had Luciano in the driveway?
THE WITNESS: Yes, sir.
Q. And you weren't in a barroom?
[98] A. Yes, sir.
Q. How tall is Luciano?
A. Taller than me.
Q. How tall are you?
A. Six foot three.
Q. How much do you weigh?
A. 205.
Q. And Luciano?
A. He is a little heavier than I am.
MR. CRIMI: That is all. I want the Court to know, subject to my looking at the police reports, that I want to ask Mickelson something.
THE COURT: Reserved.
MR. SPIRES: At this time, on the basis of the testimony of the People's own witnesses at this hearing, I find that the People cannot in good conscience do otherwise than to stipulate at the present time on the morning of August 11, 1971 the Defendant, Irving Jerome Dunaway was in the physical custody of the detectives of the Rochester Police Department from the time that he left with two such detectives from 102 Walnut and until and including the time he reached the Detective [99] Division at police headquarters.

Also stipulate if he had attempted to leave the presence of the police officers at any time during that period, he would have been restrained physically and handcuffed, if necessary.

Now, the police witnesses this morning testified that he was not normally under arrest and the last witness

testified he was in custody. But, as an Appellate lawyer, I cannot find in the real distinction in contemplation of the law of arrest as to whether or not the term "arrest" is used under the circumstances.

THE COURT: Will you accept that?

MR. CRIMI: I accept that in view of that stipulation that it would appear to me that there would be no value to present witnesses that would testify to the Defendant being put into physical custody, since I believe that stipulation makes it a matter of law.

THE COURT: My understanding is this hearing is concluded?

MR. CRIMI: The hearing is concluded. However, obviously, I am not sure of the procedure, either by the judicial notice or otherwise. The record of the [100] testimony of all of the witnesses, including Mr. Dunaway's testimony, should be considered part of this.

THE COURT: The Court will take judicial notice the minutes of the pretrial suppression hearing conducted in this case.

MR. CRIMI: What I want to say, if the Defendant Dunaway were called to the stand today he would testify in the same fashion and manner he testified previously at the trial as well as the suppression hearing.

MR. SPIRES: That is a conclusion on your part unwarranted that evidence is before the Court.

MR. CRIMI: That is what I mean, unless you want me to put him on the stand.

THE COURT: The Court takes judicial notice of Mr. Dunaway's prior testimony at the pretrial suppression testimony.

MR. CRIMI: Possibly at the trial all of these matters were going into, both at the trial to some extent—

THE COURT: The Court takes judicial notice of the transcript of the trial as far as Dunaway's examination is concerned.

[101] MR. SPIRES: Yes, that is proper. The proofs are closed as far as the People are concerned.

THE COURT: Your rights are reserved to submit additional proof, Mr. Crimi.

MR: CRIMI: I will not argue about the sufficiency of the People's case at this point. I would have to examine the record or maybe I will suspend that for some other time. In other words, I am going to have to order these minutes plus look at the other minutes to address as to whether or not this legally is as what your decision should be.

Does your Honor want briefs on this matter, is what I am trying to say?

THE COURT: Yes.

MR. CRIMI: I am trying to say at a hearing normally there is a motion made saying that everything should be suppressed. I am saying that I am not prepared to make the motion at this point. I can't make it in depth. I don't have, on my fingertips, all the testimony at the previous hearing incorporated in this hearing, but my motion would be, then, in view of the fact he was [102] or he is now stipulating that he was in physical custody from the point of his apprehension at 102 Walnut, that he was not at any time advised of any rights until he was delivered to police headquarters at around 9:00 o'clock.

If my recollection serves me correctly, I think if my recollection of the record serves me correctly, shortly after he arrived at police headquarters for a period of five or ten minutes there was conversation in which it was done without advisement of counsel and again, if memory serves me correctly, Dunaway testified at the trial that he was not advised of his rights until the stenographer came in to take a stenographic statement which was approximately 10:30 in the morning.

Detective Novensky testified he did advise him orally of his rights five or six minutes after he arrived at headquarters. That a second statement was taken later on that day and that as a consequence of the manner which he was taken into custody, into the physical custody and the time it expired while he was in [103] such physical custody without any advice of his rights. This was a primary illegality which tainted the receipt of the confession as well as I recall two diagrams.

I suppose what the Court is going to have to decide is wheher or not the so-called information that was received by Lieutenant Fantigrossi was sufficient to cause the physical apprehension of the Defendant and my view is it was hearsay far removed from the actual declarant.

Also, if my recollection serves me, neither of the two informants were in any form or fashion reliable. I believe that Major Fantigrossi testified he had no previous contact with the informant. The record will show quite clearly one of the informants had indicated that a conversation with another individual had been to the effect that a James Cole was one of the participants in this incident, but later on it was found that James Cole was not a participant in this incident. It was a result of which indicates to me that the informant was not reliable [104] and that is to say that at least five percent of what he told the police was not true. There is no previous reliability established.

Based on this double or triple hearsay and based on the legality, it would appear to me it was insufficient probable cause to put the Defendant into physical custody and the type of detention here. For the period of time, I don't think it can be justified for or by the information that was in possession of the police.

I, further, would like to point out to the Court that apparently these police officers had been to Dunaway's house on Broad Street two or three times previous to 8:00 o'clock. That they had searched through the house looking for Mr. Dunaway. At no point in any of these proceedings did the police have any arrest warrant or any search warrrant whatsoever.

I think the Court can take judicial notice that on the fact both Detectives Mickelson and Luciano are of sufficient height and girth to have handled the situation quite readily, al- [105] though I should not dwell on that. There is a stipulation that he was in physical custody.

Based on all that I think this hearing should result in the exclusion of the confession and the diagrams and also the two confessions and I think one of the cases that has to be looked into is *Brown versus Illinois*. It is a case that caused this case to be remanded to this Court.

I think, generally speaking, a broad view of the *Brown versus Illinois* and I know there is going to be some factual distinction. Where there has been an arrest of an individual that is not based upon probable cause, that that is a primary illegality and as a consequence of that illegality, anything that is taken, such as a confession or seizure of evidence can become excluded.

I think I rest on that case. That is my motion and if it is necessary to brief the matter, I will be happy to brief the matter given some time to do so.

THE COURT: Thank you, Mr. Crimi.

MR. SPIRES: Your Honor, I respectfully submit to the [106] Court the issue of the voluntariness of the statement and hand drawings given by Dunaway to the police, the voluntariness aspect, not the admissibility, but the voluntariness of it has already been determined by Judge Ogden in his law of the case in the matter. I am prepared to submit authority to that effect, if the Court so desires.

There is also the appeal evidence in the trial record including Dunaway's open admission they were given voluntarily.

Now, as to the admissibility and to whether or not this Court may now find contrary to Judge Ogden's earlier finding that the statement or the hand drawings or both were not admissible or should not have been admitted into evidence at the trial and is now entitled to a new trial. There are three broad concepts which the People could seek to justify the admissibility.

One is the concept of voluntary consensual accompaniment of the police by Dunaway down to police headquarters. I think as a result of this hearing we have had before your Honor, that the [107] concept has been removed as something we can argue.

The second is that even though the police took him into custody or detained him, that he had legal reasonable cause to do so under the concept of *People versus Morales*, 22 N Y 2d, 55 and cases which have followed that as cited in the District Attorney's brief on remand to the Court of Appeals.

I submit this case falls squarely within that concept and falls squarely within the fact situation complied by the Court of Appeals when they decided the *People versus Morales.*

The third concept is that the police did in fact have probable cause to arrest Mr. Dunaway. If such probable cause were to exist, it would have to exist on the basis of the information Detective or Major Fantigrossi testified yesterday. I think it is not quite the way Mr. Crimi puts in. For example, we don't hear what Mickelson's informant said or what Detective Mickelson said because Fantigrossi then went directly to this Mr. Cole and spoke to him.

We have triple hearsay. Cole testified to [108] what a man named Adams told him that Adams younger brother had confessed to implicating a co-defendant, Irving Dunaway. This is triple hearsay.

We have as precedent for triple hearsay supporting probable cause, two arrests, the Fifth Circuit, *U.S. versus Romano*, 482 Fed. 2d, 1183. Whether or not the fact of this case can be brought within the holding of that case, I don't know. It depends on following the trial of reliability from one hearsay informant to another. I think that is a matter which we would have to do a little research on. I am not foreclosing that as a possibility for justifying the admissibility. I am relying on *People versus Morales.*

THE COURT: Thank you.

Decision is reserved. The Court is in recess.

MR. SPIRES: May we stay on the record, your Honor? There is another matter to be considered and that is whether or not Mr. Dunaway's continued presence in Rochester is appropriate. Also, this will in turn depend on what options this [109] Court has by virtue of the Court of Appeals remand. It seems to me that the directions given to the Court were to make findings of fact at this hearing and then presumably to file the decision in the County Clerk's Office. I must admit I am not clear on the post hearing procedures.

MR. CRIMI: Neither am I. I assume we will have to call the Court of Appeals and find out what they want.

I don't know whether your findings of fact are filed with them and they review them or whether we go through—

MR. SPIRES: I am wondering if it might not be appropriate to return Dunaway to the facility from whence he came. This Court has such a tremendous backlog on the matter that it has reserved decision and the Order mandated that the proceedings here be concluded within thirty days.

THE COURT: It is the Court's contention to make findings of fact and determination as to the admissibility of the confession.

MR. SPIRES: We understand. What about Dunaway? Do you want him to remain in Rochester?

[110] THE COURT: I don't think there is any reason for Mr. Dunaway to remain in Rochester. If it becomes necessary at some future date we could bring him back under a Court Order.

MR. CRIMI: Is there any reason he can't? Is there any financial reason?

MR. SPIRES: It is up to the Court whether he remains here.

MR. CRIMI: May I aproach the bench?

(Whereupon there was an off the record discussion.)

THE COURT: It is the direction of the Court that the Defendant be returned to Great Meadow Correctional Facility on or after August 19, 1976.

The Court is in recess.

END OF TESTIMONY

[Court Reporter's Certificate (omitted in printing).]

STATE OF NEW YORK
COUNTY OF MONROE
COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK

—*vs.*—

IRVING JEROME DUNAWAY

DECISION—March 11, 1977

MARK, J. The defendant was convicted of Murder in violation of Section 125.35(3) of the Penal Law, and he appealed. Following affirmance of this conviction by the Appellate Division, Fourth Department, and by the Court of Appeals, the U.S. Supreme Court granted certiorari.

The U.S. Supreme Court then remanded this case to the Court of Appeals *Dunaway* v. *New York*, 422 US 1053, "for further consideration in light of *Brown* v. *Illinois*, 422 US 590", and the Court of Appeals ultimately remitted to this court for further proceedings to determine if the defendant's inculpatory statements and sketches were the result of an illegal detention *People* v. *Dunaway*, 38 NY2d 812.

Pursuant to such direction, a post-trial evidentiary hearing as held at which the following facts relative to the defendant's detention were adduced:

> Philip C. Argento was murdered on March 26, 1971. On August 10, 1971, then Lt. Anthony L. Fantigrossi received information from a fellow police officer that an informant (named) had told him that one James Cole had told the informant that Irving (no surname) and himself (Cole) were involved in the murder. Cole was interviewed by Lt. Fantigrossi, but he denied any involvement.
>
> However, Cole stated that approximately two months earlier Hubert Adams had informed him that Adams' brother "Ba Ba" Adams and Irving a/k/a "Axelrod" (no surname) were responsible for the murder of Mr. Argento and that he had received this information from "Ba Ba" Adams. Having acknowledged that Irving a/k/a "Axelrod" was the defendant, Fantigrossi ordered detectives to find the defendant and bring to police headquarters for questioning.
>
> The defendant was located by three detectives on August 11, 1971, but he was not arrested. However, he was in the physical custody of such detectives from the time of the initial contact until he reached police headquarters, and had he attempted to leave the company of the said detectives, they would have physically restrained him (per stipulation of People at conclusion of hearing).

Based upon the above, there can be no doubt that this case does not involve a situation where the defendant voluntarily appeared at police headquarters in response to a request of the police *Oregon* v. *Mathiason*, —— US ——, 1/25/77, or where the defendant was merely escorted to police headquarters by the police *People* v. *Brown*, 86 Misc2d 339.

There is also no question that the inculpatory statements and sketches made by the defendant were voluntary *People* v. *Huntley*, 15 NY2d 72, and that there was full compliance with the mandate of *Miranda* v. *Arizona*, 384 US 436. These findings were made at a hearing held prior to trial and of course became the law of the case *People* v. *Blake*, 35 NY2d 331.

The People argue that the Court of Appeals in *People* v. *Morales*, 22 NY2d 55, held that the police could detain a defendant for custodial questioning on less than probable cause to arrest. However, the U.S. Supreme Court on appeal in *Morales* v. *New York*, 396 US 102, "declared in no uncertain terms that it was not ready to adopt the ruling of the New York Court of Appeals that the state may detain for custodial questioning on less the probable cause for a traditional arrest." *People* v. *Mitchell*, NYLJ, 1/21/77, p. 14, c. 5.

Upon remand from the U.S. Supreme Court, the trial court after a post-conviction hearing determined the

defendant had been arrested on probable cause, but even if he had not, his detention for a reasonable and brief period was proper *People* v. *Morales*, NYLJ, 5/21/71, p. 18, c. 2. This decision was affirmed by the Appellate Division, First Department, without opinion although there were two lengthy concurring opinions and one strong dissenting opinion *People* v. *Morales*, 52 AD2d 818. Leave to appeal was granted by the Court of Appeals on June 16, 1976. (It may well be that the result of this appeal will not be a definitive ruling because of the finding of probable cause to arrest by the trial court *People* v. *Chappel*, 38 NY2d 112.)

Subsequent to its decision in *Morales* v. *New York*, supra, the U.S. Supreme Court in *Brown* v. *Illinois*, 422 US 590, issued another opinion in this complex area. In that case police officers obtained the defendant's name from the victim's brother as an acquaintance of the victim and not as a suspect. The defendant was arrested without probable cause and without a warrant and confessed after being given the prescribed *Miranda* warnings. It was held that the defendant's inculpatory statements were the product of an unlawful seizure of his person in violation of the Fourth Amendment and were therefore inadmissible.

In so ruling the U.S. Supreme Court used strong language to indicate its disdain for custodial questioning without probable cause to arrest: "The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was "for investigation" or for "questioning . . . ." The arrest, both in design and in execution, was investigatory, 422 US at 605." If *Miranda* warnings . . . . attenuate the taint of an unconstitutional arrest . . . . Arrests made without warrant or without probable cause, for questioning or "investigation," would be encouraged . . . ." 422 US at 602.

In view of the holding of the U.S. Supreme Court in *Brown* v. *Illinois*, supra, it is problematical whether the decision of the Court of Appeals in *People* v. *Morales*, supra, is still the law of New York. However, the post-

Brown decisions of our courts have not established any pattern of preciseness in this area.

People v. *Martinez*, 37 NY2d 662, citing *Brown* held that although the arrest on one charge was illegal, questioning about another unrelated charge on the basis of independent evidence was proper. The dissenting opinion of the Appellate Division in *People* v. *Morales*, supra, asserted flatly that ". . . . all debate on that provocative question has now been foreclosed by the very recent authoritative holdings in *Brown* v. *Illinois* (citation omitted); and *People* v. *Martinez* (citation omitted);" the two concurring opinions adopted the rationale of the Court of Appeals in *Morales*. In *People* v. *Lee*, 84 Misc 2d 192, *Morales* was cited with approval but it was acknowledged that its concept had not received U.S. Supreme Court acceptance. *People* v. *Mitchell*, supra, stated unequivocally that *Brown* is controlling law in this state.

Regardless of whether *People* v. *Morales* is still a viable concept in this state, this court is bound by the mandate of the U.S. Supreme Court in *Dunaway* v. *New York*, *supra*, and the Court of Appeals in *People* v. *Dunaway*, supra.

As has been stated previously, the U.S. Supreme Court remanded this case to the Court of Appeals "for further consideration in light of *Brown* v. *Illinois* (citation omitted)." The Court of Appeals remitted this case "for a factual hearing . . . . and, in the event there was a detention and probable cause is not found for such detention, to determine the further question as to whether the making of the confession was rendered infirm by the illegal arrest (see *Brown* v. *Illinois* (citation omitted))." In this context the term "arrest" has been used by that Court as synonomous with the term "detention."

Thus, both the U.S. Supreme Court of the United States and the Court of Appeals have directed this court to resolve the issue of probable cause in this case pursuant to *Brown* v. *Illinois*, supra. It should be considered significant that the Court of Appeals made no reference to *People* v. *Morales*, supra, in the direction contained in its remittur, so that case is of no moment here. This

is the posture, therefore, in which the factual pattern of the instant case should be analyzed.

It is true that the statement by "Ba Ba" Adams to his brother Hubert Adams was a declaration against the former's penal interest *People* v. *Brown*, 26 NY2d 88, but it is not a declaration against the defendant's penal interest. There was no showing as to the reliability of either Hubert Adams or James Cole *Spinelli* v. *United States*, 393 US 410; *Aguilar* v. *Texas*, 378 US 108. Also, Lt. Fantigrossi received this information approximately four and one-half months after the murder, so it was stale *Sgro* v. *United States*, 287 US 206. The triple hearsay in *United States* v. *Romano*, 482 F2d 1183, and the statement of an accomplice to the police implicating the defendant in *People* v. *Logan*, 39 Misc 2d 593, both of which were found acceptable as probable cause, are readily distinguishable.

In the first *People* v. *Morales* the police had information that the defendant was present in the apartment building at the time of the murder, that he was a known narcotics addict, that he constantly frequented the building and he had not been seen since the killing. The triple hearsay present here might possibly be equated with the paucity of factors found to be probable cause by the Court of Appeals but denied sanction by the U.S. Supreme Court. However, it cannot be gainsaid that it falls far below the square adduced by the trial court in *Morales* on remand. In fact, *one* of the more than ten items of information received by the police in that case was a statement from a narcotics addict who knew the defendant well that the defendant was the killer. It is not clear whether this was single or multiple hearsay, but this was a minute part of the information available to the police; by itself it would most assuredly have been insufficient.

Since *People* v. *Martinez*, supra, rested upon the attenuation theory, the Court of Appeals emphasized that the police had independent evidence linking the defendant to the murder and this served to break the causal chain between his unlawful arrest and his interrogation. This evidence consisted of a female friend of the defendant

stating to the police that the defendant had admitted the stabbing to her; a search of the defendant's apartment during which the victim's coat and a switchblade knife were found; and "people in the street" informing the police of the defendant's involvement in the murder. All of this evidence was available to the police within six days after the murder.

While this was not a pivotal point in *Martinez*, because the defense emphasis was on the illegality of the defendant's arrest on the first charge, it is manifest that the evidence there was much more than the triple, unreliable and stale hearsay upon which the defendant's detention was predicated in the instant case.

This case is very analogous to *People* v. *Mitchell*, supra. There the police received a message from the victim to the effect that he had been told that the defendant or one of his associates had been overheard bragging of having committed the burglary at the victim's house. Based upon this hearsay information the defendant was taken into custody and confessed after being given the *Miranda* warnings. The court concluded that the arrest of the defendant was founded solely upon hearsay and rumor not giving rise to probable cause and the confession was inadmissible.

Accordingly, the factual predicate in this case did not amount to probable cause sufficient to support the arrest of the defendant.

(In fact, for whatever its import, the police at the post-trial hearing conceded that the information in their possession did not constitute sufficient probable cause for the arrest of the defendant.)

Since the *Miranda* warnings by themselves did not purge the taint of the defendant's illegal seizure *Brown* v. *Illinois*, supra, and there was no claim or showing by the People of any attenuation of the defendant's illegal detention *People* v. *Martinez*, supra, the defendant's statements and sketches are inadmissible.

Therefore, by virtue of the federal and state decisional law applicable to the instant case, this court is considered to grant the defendant's motion to suppress his inculpatory statements and sketches.

This decision constitutes the order of the court.

Dated: Rochester, New York
March 11, 1977

/s/ Donald J. Mark
DONALD J. MARK
Monroe County Court Judge

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION,
FOURTH JUDICIAL DEPARTMENT

PRESENT: MARSH, P.J., MOULE, CARDAMONE, DENMAN, WITMER, JJ.

PEOPLE OF THE STATE OF NEW YORK, APPELLANT

v.

IRVING JEROME DUNAWAY, RESPONDENT

The above named People of the State of New York, plaintiff in this action, having appealed to his Court from an order of the Monroe County Court, entered in the Monroe County Clerk's office on March 11, 1977 and said appeal having been argued by Melvin Bressler of counsel for appellant, James Byrnes of counsel for respondent, and due deliberation having been had thereon,

It is hereby ORDERED, That the order so appealed from be, and the same hereby is reversed and the motion is denied.

Opinion by Moule, J., which is hereby made a part hereof; Marsh, P.J. and Witmer, J. concur; Denman, J. concurs in an Opinion; Cardamone, J. dissents and votes to affirm the order in an Opinion.

Entered: March 1, 1978

MARY F. ZOLLER
Clerk

SUPREME COURT OF NEW YORK
APPELLATE DIVISION

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT

v.

IRVING JEROME DUNAWAY, RESPONDENT

Fourth Department, March 1, 1978

OPINION OF THE COURT

MOULE, J.

This is an appeal by the People from an order granting defendant's motion to suppress certain inculpatory statements and sketches made by him in which he admits his involvement in the murder of a pizza shop proprietor.

On March 26, 1971, two men entered a pizza shop in Rochester and, in the course of an attempted robbery, one of them shot and killed the proprietor. Four months later, on August 11, 1971, three police officers went to defendant's home to question him about his participation in the robbery. According to the police testimony, defendant was asked to come downtown to talk and did so voluntarily. Defendant was taken to police headquarters where he was placed in an interrogation room and given his *Miranda* warnings. He then waived his right to counsel and consented to talk to the detectives. He made an incriminating statement, which was repeated for a stenographer. He also made two sketches useful to the prosecution. The following day defendant asked to see one of the police officers and made a second more complete statement.

Defendant was indicted on two counts of murder and one count of attempted robbery. Following a hearing on defendant's motion to suppress his statements and sketches, the motion was denied. After a jury trial defendant was convicted of felony murder and attempted robbery and sentenced to a term of 25 years to life on the murder count and a maximum term of 15 years on the attempted robbery count, the sentences to run concurrently. Defendant appealed his conviction and this court and the Court of Appeals affirmed, without opinion (42 AD2d 689, 35 NY2d 741). The Supreme Court of the United States granted certiorari and thereafter vacated the judgment and remanded the case to the Court of Appeals for further consideration in light of *Brown* v. *Illinois* (422 US 590) (*Dunaway* v. *New York*, 422 US 1053). The Court of Appeals remitted the case to the Monroe County Court for a factual hearing on whether defendant was detained and, if so, whether there was probable cause for the detention and, if there was a detention and probable cause was not found, whether the making of the confessions and the accompanying sketches were rendered infirm by the illegal arrest (*People* v. *Dunaway*, 38 NY2d 812, 813-814). It is from the decision and order of the County Court granting defendant's motion to suppress his statements and sketches that the People appeal.

We believe that this case is controlled by the recent decision of the Court of Appeals in *People* v. *Morales* (42 NY2d 129) in which the court rearticulated the views expressed in its earlier *Morales* decision (22 NY 2d 55) that "[l]aw enforcement officials may detain an individual upon reasonable suspicion for questioning for a reasonable and brief period of time under carefully controlled conditions which are ample to protect the individual's Fifth and Sixth Amendment rights" (42 NY2d, at p 135). "'[A] policeman's right to request information while discharging his law enforcement duties will hinge on the manner and intensity of the interference, the gravity of the crime involved and the circumstances attending the encounter'" (42 NY2d, at p 137, quoting from *People* v. *DeBour*, 40 NY2d 210, 219).

[1] Here, based upon information supplied to the police by an informant, who had picked out a picture of defendant from a file of photographs, the police questioned an individual who was serving time in jail and who informed them that defendant and one Adams had participated in the robbing and shooting of the pizza shop proprietor. Although this hearsay information did

not constitute probable cause to arrest defendant, in our opinion, it certainly raised a "reasonable suspicion" in the minds of the police so as to warrant their detention of defendant for questioning under *Morales*.

Furthermore, the record, which includes the transcripts of both suppression hearings, shows that defendant was picked up at approximately 8:00 A.M. on August 11, 1971 at a house on Walnut Street. According to the testimony of the police officers, they approached defendant at the house and asked him if he would come downtown to talk with them. The police assert that they never touched or abused defendant and that as they drove downtown to the station, they never spoke to defendant. When defendant arrived at the police station he was placed in an interviewing room and at about 9:00 A.M. was given his *Miranda* rights. Allegedly he told the police that he understood his rights and that he consented to waive them and discuss the matter. Most importantly, defendant testified at the suppression hearing before the trial that he was not threatened or abused by the police and that the statements he made to them were voluntary.

[2] This testimony shows that the police legally detained defendant for questioning and that such questioning was fair, reasonable, within proper limits and under carefully controlled conditions which were ample to protect his Fifth and Sixth Amendment rights. Moreover, as in *Morales*, the crime committed here was a brutal and henious felony, the period of detention was brief and defendant was fully advised of his constitutional rights. We are not dealing here with a situation where the defendant was arrested, searched and accused of a crime without even a scintilla of evidence casting suspicion upon him (see *Brown* v. *Illinois*, 422 US 590, *supra*; *People* v. *Martinez*, 37 NY2d 662). Rather, this case involves a brief detention for interrogation based upon reasonable suspicion, where there was no formal accusation filed against defendant and where great public interest existed in solving a brutal crime which had remained unsolved for a period of almost five months (*People* v. *Morales*, 42 NY2d 129, 136, *supra*). In our

opinion, the police conduct here is proper under *Morales*.

[3] Further, even if we were to find that the actions of the police officers constituted an illegal detention of defendant, there was a sufficient attenuation of this primary taint to render the subsequent inculpatory statements and sketches admissible. As the Supreme Court stated in *Brown* v. *Illinois* (422 US 590, 603, *supra*) "[t]he question whether a confession is the product of a free will * * * must be answered on the facts of each case. No single fact is dispositive." Although the court stated that the giving of *Miranda* warnings, by itself, does not always purge the taint of an illegal arrest, the *Miranda* warnings are an important factor in determining whether the confession is obtained by exploitation of an illegal arrest (422 US 590, 603, *supra*). Other factors that are relevant are the temporal proximity of the arrest and confession, the presence of intervening circumstances and, particularly, the purpose and flagrancy of the official misconduct (422 US 590, 603-604, *supra*). Defendant's testimony that he was never threatened or abused by the police and that the statements he made to them were voluntary, along with the police testimony concerning the fact that defendant was given his *Miranda* rights, lend strong support for the conclusion that defendant's confessions were the product of his free will and that the police conduct here, subsequent to defendant's initial detention, was highly protective of defendant's Fifth and Sixth Amendment rights. Moreover, the police conduct here in detaining defendant was in no manner flagrant as that in *Brown* where the defendant was formally arrested at gunpoint without probable cause and the police broke into his apartment and searched it. The defendant in *Brown* was arrested and charged with the crime simply because he was an acquaintance of the victim. The police made virtually no investigation and had no grounds for even suspecting that the defendant was involved in criminal activity. Here, defendant was a suspect and the police did have a reasonable suspicion that he was involved in the crime

being investigated. More importantly, defendant was never arrested or formally charged prior to his being given his *Miranda* rights. We believe that the statements and drawings made by defendant were of sufficient free will to purge the primary taint of any unlawful detention that may be said to have taken place and should not be suppressed.

Accordingly, the order granting defendant's motion to suppress should be reversed and the motion denied.

DENMAN, J. (concurring). I concur with the result reached by the majority as I believe this case is controlled by *People* v. *Morales* (42 NY2d 129). The police were at a stalemate in their investigation of the murder of the proprietor of a pizza parlor which had taken place some months before. A previously known informant, "Sparrow", told them that while he had recently been in jail, an inmate gave him information that "Irving", also known as "Axelrod", and two others, were responsible for the pizza parlor murder. The police verified that information by interviewing the inmate. "Sparrow", who said he knew Irving, picked defendant's picture from a group of mug shots. This was the only lead the police had in furtherance of their investigation. It seems to me that failure to question defendant at that point would have been contrary to responsible police conduct.

By defendant's own testimony, he was picked up, told that he would be questioned at headquarters and was not threatened or intimidated. He was placed in a room with the interrogation officer at approximately 9 o'clock in the morning, told of the nature of the inquiry and given his *Miranda* warnings. He made an incriminating statement shortly after 10 o'clock which he testified was voluntary, and later made some sketches relevant to the crime.

These circumstances seem to me to qualify as those "exceptional circumstances, given the public interest in solving a brutal and heinous crime", under which "[l]aw enforcement officials may detain an individual upon reasonable suspicion for questioning for a reasonable and

brief period of time under carefully controlled conditions which are ample to protect the individual's Fifth and Sixth Amendment rights." (*People* v. *Morales*, *supra*, at pp 135-136.)

The dissent believes *Morales* is inapplicable because the detention here was involuntary, purely investigatory and defendant was a "novice" in police procedures. In my opinion, the thrust of *Morales* is that police may have some latitude in exercising their investigatory responsibilities to solve serious crimes as long as their conduct is *reasonable* and carefully limited so as to insure a defendant's Fifth and Sixth Amendment rights. Rights protected by the Fourth Amendment are not violated until the conduct of the police becomes *unreasonable*.

I believe the circumstances of defendant's detention met those standards and therefore vote with the majority. Nevertheless, I must depart from the majority view that defendant's confession is admissible even if he were illegaly detained. The fact that defendant's confession was voluntary and that his Fifth and Sixth Amendment rights were not violated is, in my view, not controlling.

If the detention of defendant was not reasonable under the rule of *Morales*, he was then the victim of an unlawful arrest in violation of the Fourth Amendment and his confession, as the product of such arrest, would have to be suppressed. Under the standards of *Brown* v. *Illinois* (422 US 590), and *People* v. *Martinez* (37 NY2d 662) there were insufficient intervening circumstances to attenuate the confession and remove the tainted effect of the arrest if it were found to be unlawful. (See *People* v. *Burley*, — AD2d — Jan. 20, 1978.)

CARDAMONE, J. (dissenting). The proprietor of a small pizza shop in Rochester was shot and killed during an attempted robbery. Several months later a police lieutenant heard a rumor from a fellow officer that an informant indicated that one James Cole was involved. The officer questioned Cole who told him that two months earlier he had been informed by Hubert Adams that his brother "BaBa" Adams and Irving, also known as "Axlerod" (no surname), were responsible for the murder.

According to Cole, Hubert Adams said that he had received this information from his brother "BaBa". Rather than following up these leads either to Hubert Adams or "BaBa" Adams, the police lieutenant instead directed detectives to find the defendant, Dunaway, and bring him to police headquarters for questioning. Two plainclothes detectives, both six foot three inches or taller and weighing in excess of 200 pounds, picked up Dunaway, a five foot seven inch 130 pound 18 year old at his home. The People stipulated that defendant was in the detectives' physical custody until he reached headquarters and that had he attempted to leave their company the detectives would have physically restrained him.

Dunaway was given the usual *Miranda* warnings upon his arrival at headquarters. Shortly thereafter he made an incriminating statement, which was repeated for a stenographer. He also made two drawings useful to the prosecution. The following day Dunaway asked to see the detective and made a second, more complete statement. Both statements and the drawings were ruled admissible and introduced into evidence at trial. Dunaway was convicted of murder and attempted robbery. This court (42 AD2d 689) and the Court of Appeals (35 NY2d 741) affirmed, without opinion.

On appeal, the United States Supreme Court (422 US 1053) remanded for consideration of whether the detention of Dunaway prior to his making the statements violated any of his rights in light of *Brown* v. *Illinois* (422 US 590). The Court of Appeals in turn remanded the issue to Monroe County Court for a hearing (38 NY2d 812). That hearing was held and the trial court suppressed the statements and the drawings holding that the defendant was illegally detained and that there was insufficient attenuation of this primary taint to render the subsequent inculpatory statements and sketches admissible.

In *Brown* v. *Illinois* the Supreme Court focused on a person's Fourth Amendment right to be free from an unlawful seizure. Closely to be scrutinized, therefore, must be the claim of the majority that a suspect has been briefly detained for questioning upon reasonable suspicion

under carefully controlled conditions ample to protect his Fifth and Sixth Amendment rights (*People* v. *Morales*, 42 NY2d 129). The majority rely upon *Morales*, but there is was found that the defendant, an "experienced" 30-year-old lawbreaker voluntarily arranged to meet the police and willingly went to the police station for questioning. The "checkerboard square" of police investigation in that case pointed directly at the defendant and nobody else and the investigation was complete except for interrogation of Morales. However, in the present case, the teen-aged Black suspect was a novice in matters of police procedure. The prosecutor conceded at the suppression hearing that there was no distinction between the pickup of this defendant and an arrest, except for the absence of the word "arrest". Most important, the trial court found, and I agree, that this defendant did not voluntarily accompany the detectives to police headquarters. This small Black youth was confronted by two very large white detectives who, according to him grabbed him and took him to the police car. The detectives are not certain whether they touched him or not.

Further, here, rather than conduct a complete investigation, the police relying upon stale rumors and triple-hearsay that was over four months old when the police learned of it, seized the defendant. Such seizure clearly was solely for investigatory purposes. Even assuming that this was a detention of the kind contemplated by *Morales*, there were avenues of investigation yet unexplored, i.e., the questioning of Hubert and "BaBa" Adams which could have been easily accomplished since at least the latter was then in prison. From all these circumstances, and unlike *Morales*, it may not be said that Dunaway was briefly detained under carefully controlled circumstances. Rather, he was illegally seized, detained or arrested and his rights should not turn upon the use of failure to use the word "arrest" where that, in fact, was his status.

In my view, the majority's reliance upon *People* v. *Morales* (*supra*) and *People* v. *De Bour* (40 NY2d 210) is misplaced. It is recognized in New York that police in an encounter in a public place have authority to de-

tain briefly and request information from citizens while discharging their law enforcement duties (*People* v. *De Bour*, *supra*). This is not such a case. The majority read *Morales* to posit a broad test of reasonable police conduct under the circumstances. Instead *Morales* sets forth a tightly drawn and carefully articulated rule limited to exceptional circumstances. In reversing the trial court's suppression order the majority extend the ambit of *Morales* beyond these established parameters and in so doing violate Dunaway's rights in light of *Brown* v. *Illinois* (422 US 590, *supra*).

Having established the primary taint of an illegal seizure, an examination of this record demonstrates that it has not been attenuated under the criteria established in *Brown* v. *Illinois* (*supra*). In order to determine whether the primary taint of the illegal seizure of the defendant has been purged, three factors in addition to the *Miranda* warnings must be considered: the temporal proximity of the arrest and the confession, the presence of intervening circumstances and the purpose and flagrancy of the official misconduct (*Brown* v. *Illinois*, 422 US 590, 603-604, *supra*). Dunaway's confession made within two hours was in close temporal proximity to his arrest; there is not the slightest suggestion in the record of the presence of any intervening circumstances; and, finally, the arrest or detention made here, concedely without probable cause, without a warrant and under circumstances which were clearly investigatory in nature constitutes flagrant official misconduct. The facts of this case are almost on point with those in *Brown*. There the Supreme Court held that the defendant's statements were inadmissible without regard to the nature of the crime which was, as in the instant case, murder.

Accordingly, I feel constrained to dissent and vote to affirm the order which suppressed the inculpatory statements and sketches.

MARSH, P.J., and WITMER, J., concur with MOULE, J; DENMAN, J., concurs in an opinion; CARDAMONE, J., dissents and votes to affirm the order, in an opinion.

Order reversed and motion denied.

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

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PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

—*v*—

IRVING JEROME DUNAWAY, RESPONDENT.

Present: MARSH, P.J., MOULE, CARDAMONE, DENMAN, WITMER, JJ.

A motion having been made on behalf of the respondent for an order amending the decision on the appeal taken herein to state that the decision was made exclusively upon the law, and for other relief.

Now, upon reading and filing the affidavit of James M. Byrnes sworn to March 20, 1978, the notice of said motion with proof of service thereof, the opposing statement of Melvin Bressler dated March 29, 1978 and due deliberation having been had thereon,

It is hereby ORDERED, That said motion be and the same hereby is denied.

Entered: April 7, 1978

MARY F. ZOLLER, Clerk

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. MATTHEW J. JASEN,
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

against

IRVING JEROME DUNAWAY, APPELLANT

CERTIFICATE DISMISSING APPLICATION FOR LEAVE TO APPEAL

I, MATTHEW J. JASEN, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* the application for leave to appeal is hereby dismissed upon the ground that CPL 450(2)(a) does not provide for review of the order appealed from.
Dated at Buffalo, New York

May 10, 1978.

/s/ Matthew J. Jasen
Associate Judge

* Description of Order:

Order of Appellate Division, Fourth Department, entered March 1, 1978, reversing Monroe County Court order entered March 11, 1977, and order of Appellate Division, Fourth Department, entered April 7, 1978, denying motion for an order amending the order of March 1, 1978, to state that it was made exclusively upon the law.

DECISION COURT OF APPEALS

Jun. 13, 1978

Mo. No. 536

THE PEOPLE &C., APPELLANT

vs.

IRVING JEROME DUNAWAY, RESPONDENT

Motion, treated as one for reargument, denied.

SUPREME COURT OF THE UNITED STATES

No. 78-5066

IRVING JEROME DUNAWAY, PETITIONER

v.

NEW YORK

ON PETITION FOR WRIT OF CERTIORARI TO the Court of Appeals Court of the State of New York.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

November 27, 1978

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